Comment on Cases

ATTORNEY AT LAW: RIGHT OF MANAGING CLERK NOT LICENSED AS ATTORNEY TO SHARE PROFITS FROM PRACTICE: PARTNERSHIP—The brief opinion in which the judgment of the lower court in *Johnson v. Davidson*[1] is affirmed and rehearing is denied, is the first in California directly involving a question necessitating a definition of the nature of the practice of law.[2] The plaintiff in this case was an experienced nurse. She undertook the rehabilitation of Davidson, a lawyer whose practice had suffered from his intemperate habits. In return, Davidson gave her the opportunity to learn the duties of a secretary in a law office and paid her a certain portion of the profits. After a year or so, the plaintiff, who had been successful in both directions, was receiving one-half the profits and doing all the work of the office, including seeing and advising clients and preparing papers, but not actually appearing in court. By an agreement between them, Davidson invested all the profits, undivided, in real estate. After his death the plaintiff brought this action for her undivided one-half interest. The lower court considered the relation between them to have been a partnership in the practice of law, and held that, although the partnership was illegal, the agreement as to the investment of profits could be recognized. In affirming the judgment for the plaintiff, the Supreme Court rested its decision upon a different ground, holding that the plaintiff was not practicing law, but was merely a clerk whose wages were referred to a fixed percentage of office receipts. The brevity of the discussion of this point in the opinion seems unfortunate. Possibly a different result might have been reached had detailed reasoning presented the implications of the decision more clearly to the court.

Had the plaintiff been interviewing clients, drawing papers, and conducting the office business of an attorney solely on her own account, the court would have undoubtedly followed other jurisdictions in holding that such acts amounted to the practice of law.[3] Being done without a license they would have constituted either a misdemeanor or contempt of court.[4] Under section 299 of the Code of Civil Procedure, as amended in 1921, a disbarred attorney would apparently be precluded from such practice, whether on his own account or for another. Under

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[1] (November 14, 1921) 62 Cal. Dec. 568, 202 Pac. 159. Decision of District Court of Appeal, reported in 36 Cal. App. Dec. 166.

[2] 3 Cal. Jur. 583.

[3] 2 R. C. L. 938; National Sav. Bank v. Ward (1879) 100 U. S. 195, 25 L. Ed. 621; In re Duncan (1909) 85 So. Car. 186, 65 S. E. 210, 18 Ann. Cas. 657, 24 L. R. A. (N. S.) 750; People v. Alfani (1919) 227 N. Y. 334, 125 N. E. 671; Eby v. Miller (1893) 7 Ind. App. 529, 535, 34 N. E. 836, 837; 18 Ann. Cas. 658, note.

[4] Cal. Penal Code, § 161a; Cal. Code Civ. Proc. § 281.

those statutes designed to prevent the practice of law by banks and other corporations, similar services by banks to their clients are considered illegal.[5] On the other hand, if the plaintiff's work was merely that of a clerk completely controlled by detailed instructions from a licensed attorney, the acts might be regarded as those of an agent legally employed.

It would seem that the situation of the plaintiff in the principal case is intermediate between that of the independent practitioner without a license and that of the mere clerk. The statement of facts shows her to have had apparent control of the office business. She received one-half the profits. In deciding whether or not she was to be considered as practicing law, the basic problem appears as one of policy. The restrictions generally imposed upon the right to practice are designed to protect both courts and clients from the ignorant or unscrupulous counselor. The attorney is an officer of the court.[6] He is also the agent of his client, with whom his relation is peculiarly confidential; since the client is presumably ignorant of the intricacies of legal machinery, and hence virtually in the power of the attorney whom he retains.[7] Acts or agreements which might contravene the protective spirit of the laws regulating practice should therefore be regarded strictly, rather than with a disposition to lenience. To hold that profit-sharing agreements raise a presumption that an unlicensed attorney's clerk is assuming functions denied him by law, can cause no hardship. To hold otherwise raises difficult problems in at least three directions.

The most apparent question is as to the effect of such agreements upon the activities of the ordinary law office engaged in general practice. Here the committee on professional ethics of the New York County Lawyers' Association sees one danger in the temptation to the clerk to solicit business.[8] The California case of Alpers v. Hunt[9] points out the fact that the Code of Civil Procedure[10] provides that lending of his name to one not an attorney and counselor shall be a ground for the disbarment of the attorney. It then proceeds to indicate the dangers, arising in that case from a contract to procure litigation for a law firm, but applicable here: "Such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such a sum with a third person."

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[5] Creditors National Clearing House v. Bannwart (1917) 227 Mass. 579, 116 N. E. 886; People v. Guaranty etc. Co. (1917) 180 App. Div. (N. Y.) 648, 168 N. Y. Supp. 278.

[6] 1 Thornton on Attorneys-at-Law, § 13, p. 14, and cases there cited.

[7] 1 Thornton on Attorneys-at-Law, § 12, p. 14.

[8] Question 122, cited in Costigan, Cases on Legal Ethics, p. 282.

[9] Alpers v. Hunt (1890) 86 Cal. 78, 24 Pac. 846, 21 Am. St. Rep. 17, 9 L. R. A. 483.

[10] Cal. Code Civ. Proc. § 287.

The second problem arises in the case of the disbarred attorney who, though forbidden to practice law "in any manner,"[11] would find opportunity to evade this law ready to his hand. A managing clerk who receives one-half the profits is in a position but little less advantageous than that of a partner in the firm.

Finally, the question may be raised as to the relation which such a decision as that in the principal case bears to the provisions of section 164 of the Penal Code, added in 1921, and awaiting popular vote by referendum. This section, designed especially to prevent the practice of law by corporations, provides a far fuller definition of the practice of law than has previously been on the statute books. The prohibited acts would clearly include those done by the plaintiff in the principal case, were it not for the fact that purely clerical assistance is specifically exempted from the provisions of the section, provided that the attorney receiving them maintains full responsibility to his clients. But this exemption does not fully cover the case of the profit-sharer. Nor does it dispose of the problems of policy peculiarly inherent in such a case. To consider the exemption of clerical services as applicable here might well open a loop-hole through which those whom the law is intended to reach might escape its provisions.

On grounds of policy, therefore, it might seem that the decision that the plaintiff was not practicing law was at least doubtful. From very early times those circumstances which tend to cause the services of the counselor to be measured with a pecuniary yardstick have been looked upon with suspicion. In Rome, the advocate was dependent upon the generosity of him whose cause he undertook. The English barrister is, to this day, precluded from insisting on a legal right to remuneration for his services. The English solicitor, it is true, may recover fees for the legal business transacted by him.[12] He is, however, barred by statute from recovering such fees if he is not fully qualified.[13] And a solicitor who wilfully allows his name to be used in connection with legal proceedings by an unqualified person is liable to be struck off the rolls.[14] The prohibition as to unqualified persons acting as solicitors extends to the taking of instructions for, or preparation of papers in such matters as probate, administration, conveyancing and so forth.[15]

In this country, though the distinction between barrister and solicitor as to fees has long since disappeared, there still exists a similar feeling as to the status of the profession as a calling rather than a business. As one court says: "Manifestly the

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[11] Cal. Code Civ. Proc. § 299.

[12] For the history of the financial relationships between attorney and client, 1 Thornton on Attorneys-at-Law §§ 1-7, pp. 1-9.

[13] 26 Halsbury, The Laws of England, Solicitors, §§ 1389, 1390, pp. 855-857, and statutes and cases there cited.

[14] Ibid.

[15] Ibid.

practice of the law is not a craft, nor trade, nor commerce. It is a profession whose main purpose is to aid in the doing of justice according to the law between the state and the individual, and between man and man."[16] Does not the recognition of an arrangement which tends on the one hand to make the attorney over-solicitous as to his fees, and on the other hand to put an excessive share of the legal business in the hands of an unqualified person, run counter to this ideal? Possibly a more satisfactory result might have been obtained by a consideration of the case from the position taken by the District Court of Appeal, whose opinion seems worthy of examination here.[17] The assumption upon which the discussion in this decision is based is that the plaintiff was a partner, whose acts amounted to a practice of law which, being done without a license, was illegal,[18] tainting the whole partnership with illegality.[19] Had such a partnership been still in active existence, it is clear that the plaintiff could have maintained no action for an accounting as partner.[20] There is, however, a conflict of authorities as to the maintenance of an action where the partnership has been dissolved.[21] One view, of which McMullen v. Hoffman[22] is the leading exponent, holds that such actions are necessarily based upon the illegal contract, and denies recovery. The other line of decisions considers that to allow one partner to retain all the proceeds, against one with whom he previously stood in a fiduciary relation, is more opposed to public policy than to withhold the aid of the law in distributing the profits of an illegal venture.[23] The opinion under discussion definitely recognizes the latter rule, although the discussion is unnecessary in the light of the finding that the agreement between the plaintiff and Davidson was distinct from that for the illegal partnership. All jurisdictions allow recovery of proceeds from transactions which may be separated from the main, illegal, contract.[24]

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[16] In re Bergeron (1915) 220 Mass. 472, 477, 107 N. E. 1007, 1008, Ann. Cas. 1917A, 549, 551.

[17] 36 Cal. App. Dec. 166, 202 Pac. 159.

[18] Cal. Code Civ. Proc. § 281.

[19] 3 Williston on Contracts, § 1779, p. 3089; Franz v. Bieber (1899) 126 Cal. 176, 56 Pac. 249, 58 Pac. 466.

[20] 23 L. R. A. (N. S.) 478 note, and cases there cited; Chateau v. Singla (1896) 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63, 33 L. R. A. 750.

[21] 23 L. R. A. (N. S.) 478 note, 481.

[22] 174 U. S. 639, 43 L. Ed. 1117, 19 Sup. Ct. Rep. 839. *Accord:* Central Trust & S. D. Co. v. Respass (1902) 112 Ky. 606, 66 S. W. 421, 99 Am. St. Rep. 317, 56 L. R. A. 479; Snell v. Dwight (1876) 120 Mass. 9; Morrison v. Bennett (1892) 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Todd v. Rafferty (1878) 30 N. J. Eq. 254; Sykes v. Beadon (1879) L. R. 11 Ch. Div. 170, 48 L. J. Ch. 522.

[23] Cited in principal case: Andrews v. New Orleans Brewing Assn. (1896) 74 Miss. 362, 20 So. 837; Gillian v. Brown (1870) 43 Miss. 641; McDonald v. Lund (1896) 13 Wash. 412.

[24] Lewis v. Alexander (1879) 51 Tex. 578. Cited in principal case; Brooks v. Martin (1863) 69 U. S. (2 Wall.) 70, 17 L. Ed. 732; De Leon v. Trevino (1878) 49 Tex. 88, 30 Am. Rep. 101; Lestapies v. Ingraham (1846) 5 Pa. 71; Wells v. McGeoch (1888) 71 Wis. 196, 35 N. W. 769.

In resting its decision upon this separate agreement, the court speaks of the relation between the parties as a trust. There is no doubt that there was a fiduciary relationship resulting in an obligation sufficient to place upon a partner holding undivided assets and profits a duty which was not unlike debt, modified by an obligation to manage assets fairly and well.[25] Though some authorities do not consider this to be a trust in the strict sense,[26] it may be considered as falling within the language of the Civil Code in sections 2217 and 2223, upon the nature and creation of involuntary trusts, and section 2410 upon the fiduciary relation between partners. The use of the language of trusts is therefore probably justified, although, more accurately, the duty of Davidson was that of the fiduciary rather than that of the trustee. Might it not be advisable to make such a distinction clear? Otherwise there might develop a situation not unlike that met by the old lady who marked her mince and apple pies alike "T. M.," "'Tis mince" and "'Taint mince"—"'Tis true trust" and "'Taint true trust" being unduly confused.

More important than any question of phraseology is the problem of policy as to the effects of an illegal contract. The refusal of courts to recognize an illegal contract is designed to discourage the making of such contracts.[27] Where an action is brought while the business is alive, the effectiveness of this policy is fairly clear. It is more doubtful where the transaction is complete. Here there arises the question whether public interest may not be better served by allowing the settlement of affairs as though based on a legal contract than by permitting one of the contracting parties to add illegal conduct toward a former associate to his previous wrongdoing. In Chateau v. Singla,[28] the only previous case in California deciding a question as to an illegal partnership, the court refused to recognize rights arising from an existing illegal arrangement. Until this opinion by the District Court of Appeal, there was no indication as to the distance of the question at issue from the original undertaking necessary to justify an adjudication as to rights and liabilities arising from it. Just as Chateau v. Singla fixes one dividing line, so this opinion fixes another, for it would allow recovery where a distinct, legal agreement has created a basis for action separate from the illegal partnership. Where between these extremes the line should be drawn is uncertain, although in the discussion there is an indication of the probable attitude of the court, should it be directly presented with the problem of settlement of the amount of an illegal partnership after the dissolution, or after the completion of all of its illegal acts. The cases cited in the decision[29] consider public welfare

[25] Valentine et al. v. Wysor (1890) 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788.

[26] 3 Pomeroy, Equity Jurisprudence, § 1046, p. 2374, and cases there cited.

[27] See supra, n. 20.

[28] See supra, n. 20.

[29] See supra, n. 23.

to be better served by demanding fair dealing in settlement of partnership affairs than by rigidly insisting that the court cannot aid one whose rights are based upon an illegal contract. The exact point at which the taint of illegality becomes ineffective probably cannot be fixed. We can but await with interest cases which will give more clearly the other intermediate lines on which California will decide this question of public policy.

R. R. L.

CONFLICT OF LAWS: CONSTITUTIONAL LAW: SITUS OF A CHOSE IN ACTION UNDER THE INHERITANCE TAX ACT: WHAT TRANSFERS MAY CONSTITUTIONALLY BE TAXED—In *Chambers v. Mumford*[1] a non-resident testator left to the defendant, also a non-resident, an undivided one-sixth interest in a promissory note payable to a third party which note was held in this state. Both the maker and the payee of the note were residents, and the note was secured by a mortgage on California real estate. The court held that the testator's interest was not "property within the state"[2] subject to the California inheritance tax, because the situs of a chose in action follows the domicile of the owner. It saw no reason to distinguish between inheritance and property taxes in interpreting the phrase "property within the state." In cases involving property taxes the court has held that a chose in action is situated with the creditor, and therefore that a debt due from a resident to a non-resident is not taxable.[3]

Under the California Inheritance Tax Act the rule determining the taxation of movables seems to be as follows. The state may tax:

(1) All movables belonging to resident decedents regardless of location;[4]

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[1] (Oct. 14, 1921) 62 Cal. Dec. 450, 201 Pac. 588.

[2] Cal. Stats. 1913, p. 1066, which says that a succession tax may be levied "when the transfer is by will or intestate laws of property within the state and the decedent was a non-resident at the time of his death."

[3] San Francisco v. Mackay (1896) 113 Cal. 392, 45 Pac. 696 (bonds); Mackay v. San Francisco (1900) 128 Cal. 678, 61 Pac. 382. See also San Francisco v. Flood (1884) 64 Cal. 504, 2 Pac. 264, holding that where the owner of stock in a foreign corporation resided in California, the stock was taxable as property in this state, though the certificates were held elsewhere.

[4] Estate of Hodges (1915) 170 Cal. 492, 150 Pac. 344. On this question see Thomas Reed Powell, Extra-Territorial Inheritance Taxation, 20 Columbia Law Review 1; Joseph H. Beale, Jurisdiction to Tax, 32 Harvard Law Review 587, 624. Inheritance taxes, for the reason that they are privilege and not property taxes, are not within the rule of Union Refrigerator Transit Co. v. Kentucky (1905) 199 U. S. 194, 50 L. Ed. 115, 26 Sup. Ct. Rep. 36. The Supreme Court there held an attempted taxation of tangible personalty situated outside the taxing state was beyond the state's constitutional power. The court said: "It is unnecessary to say that this case does not involve the question . . . of inheritance or succession taxes . . . which are controlled by different considerations" (p. 211).